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No. 99-1471

Supreme Court, U.S.
FILED
JUN 26 2000
CLERK

IN THE
UNITED STATES SUPREME COURT

JASUBHAI K. DESAI

Petitioner

vs.

PEOPLE OF THE STATE OF MICHIGAN

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

DELAY IN CHARGING VIOLATES DUE PROCESS ONLY WHERE THERE IS A DELIBERATE DELAY FOR THE PURPOSE OF DISADVANTAGING THE DEFENDANT AND ACTUAL AND SUBSTANTIAL PREJUDICE CAN BE SHOWN. THE PEOPLE DID NOT CHARGE THE DEFENDANT UNTIL THE INVESTIGATION WAS CONCLUDED AND IT WAS BELIEVED SUFFICIENT EVIDENCE TO CONVICT EXISTED. IN THE ABSENCE OF A SHOWING OF BAD FAITH AND ACTUAL AND SUBSTANTIAL PREJUDICE CAN THERE BE A DUE PROCESS VIOLATION?

TABLE OF CONTENTS

PAGE

Index of Authorities. ii

Question Presented. 1

Opinions and Orders Of Lower Courts. 2

Statement of Case. 3

Court of Appeals Opinion. 5

Reason for Denying this Petition. 27

Conclusion. 38

Relief. 39

INDEX OF AUTHORITIES

CASES **PAGE**

People v Bisard,
114 Mich App 784; 319 NW2d 670 (1982). 8

People v Cartney,
72 Mich App 580,589; 250 NW2d 135(1976). 8

People v Hernandez,
15 Mich App 141; 170 NW2d 351 (1968). 8

People v Poole,
444 Mich 151; 506 NW2d 505 (1993). 16

People v White,
208 Mich App 126, 134; 527 NW2d 34 (1994). 10

Stoner v Graddick,
751 F2d 1535, 1544 (CA Il, 1985). 13

United States v Benshop,
138 F3d 1229, 1232-1234 (CA 8, 1998). 13

United States v Beszborn,
2t F3d62, 66 (CA 5, 1994). 13

United States v Corbin
734 F2d 643, 648 (CA 11, 1984). 13

United States v Dawn,
959 F2d 63,66 (CA 6, 1992). 10

United States v Lash,
937 F2d 1077, 1088 (CA 6, 1991). 10

United States v Rogers,
118 F3d 466,474 (CA 6, 1997). 10

United States v Valona
834 F2d 1334, 1338 (CA 7, 1987). 13

OPINIONS AND ORDERS OF LOWER COURTS

On March 21, 1997, Judge Karen Fort-Hood of the Wayne County Circuit Court (formerly Recorder's Court) issued a written Opinion and Order granting the Motions to dismiss filed by Co-Defendants Desai and Adams. (Defendant's App. Opinion and Order of Trial Court 3/21/97) On October 9, 1998 the court of Appeals issued an Opinion and Order reversing the Trial Court dismissal and remanding the case for further proceedings consistent with its opinion. (Opinion in full is Statement of Case). This opinion is not included in the petition. *People v Adams*, 232 Mich App 128 (1999)

On December 29, 1998 Defendant's Motion for Rehearing was denied by the Court of Appeals. On September 2, 1999 the Michigan Supreme Court denied Defendant's application for leave to appeal.

STATEMENT OF CASE

Defendant was charged twelve years after the murder of the victim, Turetzky. Initially, the Murder was considered unsolved, but a federal grand jury investigation into medical malpractice turned up evidence of Defendant's involvement. This evidence was presented to the police five years after the murder. The police re-opened the murder investigation. Meanwhile, Michigan law changed allowing statements against penal interest to be used as substantive evidence under certain circumstances showing sufficient reliability of the statement. The investigation continued by the convening of a state "one person" (a judge, by state law) investigative grand jury, resulting in the issuance of an indictment when the grand juror determined there was sufficient evidence for indictment.

Petitioner has failed to comply with Rule 14.1(i) which requires that opinions of the courts be included in the appendix. While petitioner notes the twelve page, October 9, 1998 Court of Appeals opinion reversing the trial court dismissal and reinstating the charges is the basis for jurisdiction, Petitioner failed to include this opinion in his appendix.

It is from this opinion which the petition seeks relief. The People therefore include the Court of Appeals Opinion as the Statement of the Case.

COURT OF APPEALS OPINION

Defendants were charged in 1995 with the November 3, 1983, strangulation murder of Anna Marie Turetzky in Woodhaven, Michigan. Turetzky, defendant Desai's business partner in the operation of a medical clinic, was found dead in her automobile parked behind a local motel. Desai had allegedly solicited defendant Adams to commit the murder. Following separate preliminary examinations, defendants were bound over and their cases consolidated for trial. Pertinent to this appeal, both defendants moved to dismiss the charges on the basis of prearrest delay, arguing that the prosecution's twelve-year delay in filing charges caused a loss of evidence prejudicial to defendants' right to a fair trial. In support of their motions, defendants relied upon a stipulation of facts regarding unavailable Witnesses and lost evidence.

According to the stipulation, the following witnesses are now deceased or otherwise unavailable: Philip Hatcher, an insurance agent who arranged life insurance policies making Desai and Turetzky beneficiaries upon the death of the other, Jintendra Surti, bookkeeper for Desai and Turetzky, who was the custodian of the clinic's banking records;

Thomas McCrary, who negotiated a clinic check for $2,018 to Adams, characterized by the prosecution as the "payoff" for the homicide; Woodhaven Police Sgt. James Johnson, the preliminary investigator of the murder; Peter Slywka, Turetzky's father, who made reward offers for the discovery of the perpetrator; Dr. Ruth Higgins, a psychiatrist who was familiar with McCrary's psychiatric problems; Dr. Gregory Kaufman, who performed the autopsy on Turetzky; and Frank Raines, an associate of key witness Lawrence Gorski.

Certain physical evidence was also stipulated by the parties to be missing: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police;[1] an "Anarchist's Cookbook"[2] once possessed by Adams; the contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue paper allegedly found by Turetzky family members in the victim's automobile after her murder and after a search of the car by the police.[3]

Both defendants filed motions to dismiss in the trial court, arguing

that all of the missing witnesses and physical evidence were potentially exculpatory and that the twelve-year delay in filing charges prejudiced their rights to a fair trial. Following an evidentiary hearing, the trial court ruled that defendants were irreparably prejudiced and unable to present a defense given the loss of testimonial and physical evidence. The trial court further found that the prosecution intentionally delayed the investigation in order to gain a tactical advantage over defendants by waiting for an anticipated change in the law that would permit the admission of Adams' inculpatory hearsay statement against Desai. The trial court granted defendants' motions to dismiss, concluding that the prosecution's reasons for delay did not justify the undue prejudice to defendants.

II

On appeal, the prosecution argues that the trial court erred in dismissing the charges against defendants. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Cartney,* 72 Mich App *580,589; 250* NW2d 135(1976). Upon review we agree with the prosecution that, under the present circumstances, the trial court abused its discretion in granting defendants'

motions to dismiss.

In People v Bisard, 114 Mich App 784; 319 NW2d 670 (1982), this Court reevaluated the tripartite test of prejudicial delay originally set forth in *People v Hernandez, 15* Mich App 141; 170 NW2d 351 (1968),' in light of post-Hernandez developments in due process jurisprudence. The *Bisard* Court, *supra at* 788, noted:

> Two United States Supreme Court cases decided after 1968 have addressed the problem of preindictment or prearrest delay. In *United States* V *Marion,* 404 US 307; 92S Ct 455; 30 L Ed 2d 468(1971), the Court recognized that the Due Process Clause afforded only "limited" protection to those persons who have not been arrested but observed that such persons' primary protection was in the applicable statutes of limitation. The Court explained this decision further in *United States V Lovasco,* 431 US 783; 97 S Ct 2044; 52 L Ed 2d *752* (1977), when it established a two-part test to be used in the due process inquiry. First, the Court observed that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 US 783, 790. Second, the Court held that, in addition to the consideration of prejudice, a court was to explore the reason for the delay.

Adopting this two-part test, the *Bisard* Court rejected an

interpretation *of Lovasco* that would place an "extremely heavy burden" on a defendant by requiring that the defendant prove both actual prejudice and unexplainable delay *Id* at 789. Instead, the Court construed *Lovasco* in the following manner:

> W]e hold that, once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end. *[Id.* at 791.

Sec also, *People v Reddish,* 181 Mich App 625,627; 450 NW2d 16(1989); *People v Loyer,* 1NW2d *159(1986);People v Dungey,* 147 Mich App 83,85; 383 NW2d 128(1985); *People v Vargo,* 139 Mich App 573, 579; 362 NW2d 840(1984); *People V Evans,* 128 Mich App 311, 314; 340 NW2d291 (1983).

Pursuant to the requisite two-part inquiry, a defendant must initially demonstrate "actual and substantial" prejudice to his right to a fair trial. *Bisard supra* at 790; *People v White,* 208 Mich App 126, 134; 527 NW2d 34 (1994)6; *Dungey; supra* at 88. Accord, *Marion, supra* 404 US

at 325; *United States v Rogers*, 118 F3d 466,474 (CA 6, 1997); *United States v Dawn*, 959 F2d 63,66 (CA 6, 1992); *United States v Lash*, 937 F2d 1077, 1088 (CA 6, 1991). In this context, as one federal court has explained, a defendant must show not only "actual prejudice, as opposed to mere speculative prejudice. .. but also that he show that any actual prejudice was substantial -- that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected."See also *Rogers, supra* at 476. This Court has reiterated that proof of "actual and substantial" prejudice requires more than generalized allegations.

> A defendant shoulders the burden of coming forward with evidence of prejudice. Until he does so, the prosecution's burden -- to persuade the court that the delay was justified in the face of any resulting prejudice -- is not triggered. The imperfection of a witness' memory may be exposed to the trier of fact during direct or cross-examination and may be emphasized to buttress or undermine credibility. If such absence of memory by a defendant's material witness due to a lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course, would be shown, and the prosecution would be required to demonstrate how that prejudice was justified by the prearrest delay. In this case, however, no such impediment or hindrance was manifest. Moreover, we decline to accept defendant's assertion on appeal that "the exceptionally long delay in the present case should itself

> raise a strong inference of prejudice." Without specific references to instances of prejudice-generating occurrences, and without specific allegations of actual prejudice resulting therefrom, the prosecution would be at an insuperable disadvantage indeed in attempting to show how such unspecified prejudice was in fact justified. We will not put the cart before the horse. [Loyer, *supra* at 120].

Although the Michigan courts have not had occasion to address the impact that the death of a material witness during an interval of prearrest delay has on the continued prosecution of a case, the federal courts have consistently held, in the present context, that the death of a witness alone is insufficient to establish actual arid substantial prejudice:

> The death of a potential witness during the preindictment period may demonstrate the requisite prejudice if the defendant can demonstrate that exculpatory evidence was lost and could not be obtained through other means. . However, a defendant does not show actual prejudice based on the death of a potential witness if he has not given an indication of what the witness's testimony would have been and whether the substance of the testimony was otherwise available.

Even where a defendant specifies what a deceased witness's testimony would have been, actual prejudice is difficult to prove. *(Rogers, supra* at 475.3.

See also, *Lovasco, supra* at 431 US at *735-786; United States v Benshop,* 138 F3d 1229, 1232-1234 (CA 8, 1998); *United States v Beszborn,* 2t F3d 62, 66 (CA 5, 1994); *United States* v*Valona,* 834 F2d 1334, 1338 (CA 7, 1987); *Stoner* v *Graddick,* 751 F2d *1535,* 1544 (CA Il, 1985); *United States* v *Corbin, 734* F2d 643, 648 (CA 11, 1984).

In the instant case, we conclude that defendants have not demonstrated the requisite actual and substantial prejudice necessary to satisfy the first prong of the *Bisard* test and thereby shift the burden of persuasion to the prosecution to show the reasonableness of the delay. Defendants have made no showing that any of these witnesses would have provided relevant information beneficial to the defense of their cases. Although defendants contend in general terms that they have been deprived of the opportunity to cross-examine the unavailable witnesses, defendants have neither specified the substance of that cross-examination testimony nor offered anything more than mere speculation concerning the exculpatory nature of such testimony. Indeed, if any party has been

detrimentally affected by the unavailability of these witnesses, it is the prosecution, not defendants. The unavailable individuals were prosecution witnesses who, it is reasonable to surmise, would have provided information valuable to the prosecution. Consequently, the prosecution must move forward without the benefit of this testimonial evidence.

Defendants have likewise failed to show actual and substantial prejudice by reason of the missing physical evidence. Defendants contend that the loss of the physical evidence has denied them the opportunity to conduct testing, such as fingerprint analysis, to determine whether the evidence may have been exculpatory. However, this argument, too, rests upon speculation. Defendants have not substantiated the potentially exculpatory aspects of this physical evidence, for instance, by delving into the substance of the missing tape-recorded conversations or explaining how the loss of the tissue paper and Anarchist's Cookbook, incriminatory in nature, prejudiced their defense.[9] In fact, testimony adduced at the evidentiary hearing held below indicated that the missing evidence was the prosecution's loss and defendants' gain, given that the *prosecution* 's case rested in large part upon this lost evidence Defendants' vague claims

of prejudice therefore fall short of the requisite proof. 10

We conclude the trial court abused its discretion in granting defendants' motions to dismiss on the basis of prejudicial prearrest delay. *McCartney, supra.* Defendants' claims of prejudice are too indefinite and speculative to satisfy the threshold requirement *of Bisard, supra,* that "actual and substantial" prejudice be shown before the burden of persuasion shifts to the prosecution to justify the delay. Defendants have not carried their burden.

III

Next, even if we were to assume the existence of actual and substantial prejudice to defendants, we nonetheless conclude that the trial court clearly erred by finding that the prosecution's proffered reasons for the delay did not justify the resultant prejudice.

In the present case, an important piece of evidence for the prosecution is the alleged statement made by Adams to witness Lawrence Gorski, in which Adams confessed to killing Turetzky at the request of Desai. Prior to the Michigan Supreme Court's decision in *People v Poole,* 444 Mich 151; 506 NW2d *505* (1993), this alleged statement could only

be introduced into evidence against Adams. However, the *Poole* decision may now provide authority for the use of Adams' statement against Desai as well. The *Poole* Court held, pursuant to MRE 804(b)(3), that a declarant's inculpation of an accomplice, made in the context of a narrative of events at the declarant's initiative without prompting or inquiry, and clearly against penal interest, is admissible as substantive evidence at trial. The trial court in the instant case found that the prosecution deliberately waited for this anticipated change in the law before filing criminal charges against the defendants:

> T]he prosecutor's office contends that the delay in prosecution of this case was due to the ongoing investigation. This is a legitimate reason for a delay
>
> However, a change in the law occurred permitting them to use Adams' alleged statement against Desai as well as himself The tactical advantage of trying both defendants together came as a result of waiting for the *Poole* decision, rather than the discovery of new evidence from an investigation. Thus, this Court finds that the prosecutor intended to Wait for an anticipated change in the law, that was tactically advantageous to them in the prosecution of this case, under the guise of conducting an ongoing investigation.

We respectfully disagree and hold that this finding is clearly

erroneous.

In *Lovasco, supra* at 431 US at 795-796, the United States Supreme Court opined that an investigative, as opposed to tactical, delay does not violate the Due Process Clause of the Fifth Amendment:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States v Marion,* 404 US at 324; 92 S Ct at *465,* precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed," *Smith vUnitedStates,360U5* 1, 10;79SCt991,997;3LEd2d *1041(1959).* This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

See also, *Bisard, supra* at 790-791; *White, supra* at 134; *Drown, supra* at 66.

Our review of the record reveals that several factors were involved in the decision not to prosecute at an earlier point in time. The testimony of then-assistant prosecutor Nancy Alberts, when read in context, is particularly telling in this regard. She testified that the *Poole* hearsay problem was but one factor in the decision not to prosecute.

Alberts' testimony clearly underscores that investigative rather than tactical concerns governed the prosecution's course of action.[12] The investigation took many twists and turns during the years following Turetzky's murder. As noted above, key witnesses died and evidence became unavailable. In 1984, a federal grand jury convened to investigate an unrelated matter involving defendant Desai, and more evidence was allegedly garnered pertaining to this investigation. Adams and the key witness, Gorski, disappeared and were eventually located outside of Michigan. Gorski failed to appear for a polygraph examination, and Adams, who did take a polygraph, appeared to have "passed" the examination. Finally, in 1994, a one-man grand jury was appointed to investigate unsolved murders within the City of Detroit, including the murder in this case. Both defendants were subpoenaed to appear before the

grand juror and, based on the cumulative evidence gathered from this investigation and the intervening years of investigation, defendants were finally charged with crimes arising out of the death of Turetzky On the record, we find no deliberate tactical delay by the prosecution and hold that the trial court clearly erred in its finding to the contrary.[3]

For these reasons, we reverse the decision of the trial court and remand these cases for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

1. These tapes were made in the approximate time frame of January through April 1984, allegedly
in an attempt to exact a confession from Adams and extort Desai.
2. This book purportedly contained underlined passages regarding strangulation techniques.
3. According to the preliminary examination testimony of the victim's children, the initials "S A"
(defendant Adams' initials) were written on this piece of tissue paper, which was turned over to the
police.
4. Pursuant to the *Hernandez* test, once a defendant demonstrated that some prejudice had occurred
as a result of the delay, it was incumbent on the prosecution to show (1) an explanation for the delay,

(2) that the delay was not deliberate, and (3) that no undue prejudice attached to the defendant.

Hernandez, supra at 147. If the prosecution failed to establish any of the three prongs of the test, a due process violation was established.

5 The *Lovasco* Court, *supra* at 431 US at 790-791, reasoned:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself," *United States v Ewell, supra,* 383 US [116] at 120; 86 5 Ct [773] at 776; [15 L Ed 2d 627 (1966)].

6. Judge Griffin acknowledges that the test for prearrest delay articulated and applied in the instant case is more precise than the standard that he recited in *White, supra* at 134-135.

Delays spanning many years have been held by courts in other jurisdictions not to be presumptively prejudicial. See, e.g., *United States v Pardue,* 134 F3d 1316 (CA7, 1998) (ten-year delay); *McDougal, supra* (nine-year delay); *United States* v , 106 F3d 89 (CA 5, 1997) (nine-year delay); *Jones. supra* (ten-year delay); *United States v Crouch,* 84 F3d 1497 (CA, 1996) (seven-year delay); *Wilson v McNaughty,* 994 F2d 1228 (CA 7, 1993) (sixteen-year delay); *Stone; supra* (nineteen-year delay).

The issue of undue prearrest delay does not entail consideration of the strength of the prosecution's case, but rather prejudice to the defense. In

this regard, we note that defendants filed motions to quash in the trial court. In lieu of its order dismissing the cases on the basis of prejudicial prearrest delay, the trial court did not address the merits of defendants' motions to quash.

7. Defendants' reliance on *People* v *Dungey,* 147 Mich App 83; 383 NW2d 128 (1985), is misplaced. In *Dungey,* the defendant was not charged with criminal sexual assault until seven months after the alleged assault occurred. Immediately after the offense, the victim underwent a physical examination, which provided secretion evidence. During the intervening delay, the evidence lost its identifying properties, thus preventing the defendant from conducting tests on the evidence. The *Dungey* Court, *supra* at 88, ruled that

> The Secretion typing tests could not prove that defendant was guilty of the act, but offered the possibility of excluding him from the class of suspects. The prosecutorial delay and neglect made it impossible to obtain the potentially exculpatory evidence, and therefore the prejudice to defendant is clear

The defendant in *Dungey* amply demonstrated that the physical properties of the missing evidence could have potentially excluded him as a suspect. The missing evidence in the instant case is potentially inculpatory, and defendants have not otherwise specified how these items may have exculpated them or meaningfully impaired the defense by their loss.

8. Moreover, this Court has held, albeit in a different but nonetheless pertinent context, that a loss of physical evidence that occurs before a defense request for its production does not require reversal absent the intentional suppression of evidence or a showing of bad faith. *People* V *Johnson,* 197 Mich App 362,365; 494NW2d 873(1992); *People v Albert,* 89 Mich App *350,352-353;* 280NW2d *523* (1979). Defendants have not succeeded in showing, based on the testimony generated at the evidentiary hearing, that the police or the prosecution acted in bad faith or intentionally suppressed or destroyed the missing evidence. On the contrary, one of the original investigating officers, Sergeant Osborn, expressly disavowed any intentional destruction of evidence.

II.

Q. *(Defense Counsel)* You earlier testified I think, and correct me if I'm wrong, that you made a decision not to prosecute at a particular time based upon the state of the law at that time regarding this penal interest exception to the hearsay rule?

A (Alberts) That was as to Dr. Desai, yes.

Q. Okay.

A. There were other considerations. That was one of them.

Q. What were the other considerations?

A. The quality of the evidence we had.

Q. All right. Is it fair to say that you weren't satisfied that there was a prosecutable case without that statement of Gorski?

A. That was one factor --

Q. Do you recall --

A. -- as against Dr. Desai.

Q. Okay. Do you recall other factors?

A. There were a problem with -- that the case was a circumstantial one, as I remember it although I don't remember all of the evidence, but I remember that being one problem. And another one was the the quality of the evidence against Adams, the quality of Mr. Gorski's testimony as - and I think that's about it. It was not the -- at that point it certainly was not -- not as strong a case as I thought we could deal with.

Q. Okay. Was caseload a factor, your caseload?

A. No.

Q. Okay. In terms of Gorski, did you ever interview him yourself?

A. No.

Q. Do you recall one of the problems with Gorski being the fact that after he was interviewed, he was requested to take a polygraph and he didn't show up for the polygraph?

A. Yes.

Q. Okay. Your decision to not prosecute based upon the state of the law regarding the penal interest exception to the hearsay rule was made before or after you received those [grand jury] transcripts?

A. My decision to not prosecute was based on a number of factors. That decision was made after Mr. Gorski did not take the polygraph and I don't think we did anything else after that, so if that would help you with you time frame, I believe that everything was concluded after that point.

Q. Did you at Some point in time make a strategic decision or a tactical decision to not prosecute this case at a particular point in time until the law changed or became more favorable with regard to the admissibility of this conversation that had problems relating to the penal exception to the hearsay rule?

A. No.

Q. Did you ever consider that the longer that you delay in bringing or prosecuting this case, that it was going to have a detrimental effect on the ability to reconstruct facts through witnesses because memories would have been faded or evidence would have become lost?

A. As to this particular case, I mean what I - I want to be careful here because always it's a detriment that a case is old. At the time I got the case, that was going through my mind because I got the case a number of years after the murder had occurred. But in terms of whether or not I delayed, I had no intention of delaying it. To me it was a decision of whether or not I'm going to prosecute or not prosecute.

Q. As you look back on this case now, was it the ability or the wherewithal of Gorski to pass a polygraph on what he said that was pivotal in your decision whether to prosecute this case?

A. As to whether or not to prosecute the case against Steve Adams, it was very important. I don't know, I can't speculate today as to whether or not he had passed, would I have decided to prosecute, I can't tell you that, but it definitely was very important.

Q. Was there some reason that you wanted to prosecute the doctor and Mr. Adams at the same time as opposed to one before the other?

A. Well, it's always advantageous to prosecute two defendants at once but I guess that's the only reason, but I didn't see any way that I could do it.

Q. Is that to say that it gives you some sort - it's advantageous, it's some sort of a strategic advantage to do it that way?

A. Sure, if you have the evidence.

Q. Why is that?

A. Well, you only have to - you only have to do the case once, basically that's it I guess, and I would think a fact finder would understand more what you're getting at if you have two people.

Q. In other words, it's easier to present the jury with all of the persons that you think are involved in the same courtroom?

A. Sure.

Q. Was delaying a factor to collect evidence to give you an opportunity to bring the case against both of them together?

A. Well, you're assuming a question that I had a goal of delaying and it definitely was not - delay was definitely not - not a thing that I saw going in my favor at all. Delay usually goes against the prosecution, and I was never in favor of delay. And I don't remember anyone ever coming through 'fly mind or ever being communicated to me that it should be delayed. We're trying to work as quickly as possible. On cross-examination, Alberts reiterated that investigative concerns motivated her decision not to prosecute:

> Q. *(the Prosecutor,)* If you could have, in you professional judgment, charged this case in 1986, would you?
>
> *A.* Absolutely.
>
> Q. Why didn't you?
>
> *A.* I didn't think I could get past a preliminary examination.
>
> Did it concern you that on the one hand you had information, however accurate it was, that Mr. Adams had passed a polygraph?
>
> *A.* Yes.

Q. Did that influence your decision on whether to proceed at all?

A. Yes.

Q. Why?

A. Because he may have been telling the truth. Frankly, from my looking at the other evidence, I really doubted the results of the polygraph, but that is powerful evidence and assuming that it was - that it was correct, I found it to be pretty strong evidence for the defense

Q. And did -

A. A big hurdle.

Q. Were you concerned about perhaps charging an innocent man?

A. Of course.

Q. And did that weigh on voir decision?

A. Sure.

Q. To your knowledge, in the time you were in the unit, was there ever a grand jury impaneled to deal with a specific case?

A. I don't think so.

Q. Did you delay this prosecution to hurt the defense?

A. I didn't delay the prosecution at all. I denied the prosecution.

12. David Hesburn and James Osborn, two of the police officers involved in the investigation during the twelve-year period, also testified at the evidentiary hearing that the investigation was never delayed to gain a tactical advantage.

We further reject the underlying premise advanced by defendants and accepted by the trial court that the Wayne County Prosecutor is capable of predicting Supreme Court decisions years in advance of their issuance. Such clairvoyance would be most extraordinary.

REASON FOR DENYING THIS PETITION

Anna Marie Turetzky, Defendant's business partner in the operation of a medical clinic, , was found strangled in her automobile parked behind a motel on November 3, 1983. Defendant and co-defendant, Stephan Adams, also an employee at the clinic, were charged in 1995. Adams admitted in a statement that Defendant had solicited him to commit the murder. The prosecution's theory thus is that Defendant had hired Adams to murder Turetzky, his business partner, so he could collect the proceeds of the life insurance policy. The two key prosecution witnesses were Lawrence Gorski and Turetzky's daughter, Kathleen Ann Caurdy. Also essential to the prosecution's case was co-defendant, Adam's admission that Defendant hired him to commit the murder. Prior to trial, both defendants moved to dismiss the charges based upon due process prearrest delay, arguing the prosecution's twelve year delay in filing charges was deliberate to gain tactical advantage and caused a loss of evidence prejudicial to the defendant's right to a fair trial. But the "tactical advantage" claimed was not harm to the defense in the presentation of its case, but simply the change in the Michigan evidence law which occurred during the investigation and would allow Adam's statement to be used against Defendant on a proper showing of reliability.

Defendant based his due process claim upon stipulation of facts regarding unavailable witnesses and lost evidence. The trial court found deliberate delay occurred to "disadvantage" the defendant because the People admitted that one of the reasons for charging Defendant at the conclusion of the grand jury investigation was that Adam's statement could now be used as substantive evidence against Defendant.[1] The Michigan Court of Appeals found the trial court clearly erred and that the People properly charged the defendant at the conclusion of the investigation. Petitioner suggests this Court should use this case to re-define the role of Due Process with delays in arrest. This role is set forth in *United States v Lovasco,*[2] and federal courts throughout the nation

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1The essential portions of the testimony are plresented in the Court of Appeals Opinion

2*United States v Lovasco*, 431 US 783, 97 S Ct 2044__LEd2d__(1977)

hold that due process is only offended by a delay in charging where that delay was deliberate for the purpose of disadvantaging the defendant in the presentation of his or her defense, resulting in substantial prejudice to the defense in the presentation of the defense.[3]

A . The delay was not deliberately done to disadvantage the Defendant

Turetzky's murder was unsolved. Yet, a series of events caused the case to be reopened and reinvestigated:

- In 1984 a federal grand jury investigating medicare fraud called witness Lawrence Gorski, an associate of Defendant. Gorski revealed that he heard Adams admit he committed the murder of Turetzky at the request of Defendant. This information, however, was not released by the federal grand jury until July of 1988

- Based on this information the police re-opened their investigation of the Turetzky and located Gorski in October of 1988. Gorski, living in Phoenix, Arizona or Denver, Colorado agreed to fly to Detroit to take a polygraph, but did not appear. The police did locate Gorski and Gorski made a statement implicating himself and Defendant in 1989

- In June, 1994 a one person grand jury was convened to investigate unsolved murders in Detroit. Both defendants had the opportunity to present evidence to the grand jury. Based upon the results of the grand juror's investigation both defendants were separately indicted for the Turetzky murder. A preliminary examination was held and both defendants were bound over for trial.

3Indeed, Michigan currently has not quite got the test right in that it is more generous than required by due process by engaging in a balancing analysis. Federal cases require that the defense show both "prongs" of the test-there is no balancing. See e.g. *United States v Hoo*, 825 F2d 667 (CA 2, 1987): *United States v Ismail*, 828 F2d 153 (CA 3, 1987); *United States v Mmahat*, 106 F3d 89 (CA 5, 1997), among a host of cases.

- It should also be noted that in 1993 the Michigan Supreme court issued a decision which would allow a statement which is against the maker's penal interest to be used in trial against another co-perpetrator, on a proper showing of reliability.[4] This new rule would allow Adam's statement to be used against the defendant. The Prosecutor admitted that the change in the law was one of the reasons she decided to charge the Defendant as Adam's statement definitely made the murder case against Defendant stronger.

The trial court, addressing a motion to dismiss by Defendant, focused on the change in the law and found the prosecution intentionally delayed the investigation in order to gain a tactical advantage by waiting for an anticipated change in the law that would permit the admission of Adam's statement against the Defendant. Thus, the trial court found prong one was met simply because the People anticipated a change in the law while continuing the investigation. This ruling was reversed by the Michigan Court of Appeals, which relied upon *Lovasco*. The Michigan Court of Appeals ruled that an investigative delay, as opposed to a tactical delay designed not to enhance the prosecution but to harm the

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4*People v Poole*, 444 Mich 51 (1993)

defense's ability to present its case, does not violate the Due Process Clause of the Fifth Amendment. The Court concluded that the prosecutor's testimony "...clearly underscores that investigative rather than tactical concerns governed the prosecution's course of action." And that the "...based upon the cumulative evidence gathered rom this investigation and the intervening years of investigation, defendants were finally charged with crimes arising out of the death of Turetzky." Thus the Michigan Court of Appeals correctly found no deliberate, tactical delay by the prosecution and held the trial court clearly erred in its finding to the contrary.

The mere fact that a change of law occurred during the time of investigation that strengthened the People's case does not mean that there was deliberate delay by the prosecution to gain tactical advantage by disadvantaging the defense in the presentation of its case. The law changed in 1993 and the investigation was not concluded until 1994 when the one man grand jury was appointed and a grand jury investigation into the Turetzky murder took place. The prosecution properly charged defendant at the conclusion of the grand jury investigation.

B. Investigative delay does not deprive defendant of due process, even if his defense might have been somewhat prejudiced by he lapse of time.

Since both prongs--purposeful, bad-faith delay and prejudice--must be shown to make a prima facie claim of a due process violation, the analysis need not go further as the first prong cannot be met. Nonetheless, Defendant's claim of prejudice is essentially that he had gotten away with this murder until the prosecution re-investigated the case and was able to make a case against him.

As stipulated by the parties the following witnesses were either deceased or unavailable at the time of trial: *Philip Hatcher*, an insurance agent who arranged life insurance policies making Defendant and Turetzky beneficiaries upon the death of the other; *Jintendra Surti* bookkeeper for Defendant and Turetzky, who was the custodian of the clinic's banking records; *Thomas McCrary*, who negotiated a clinic check for $2,018 to Adams, characterized by the prosecution as the "payoff" for the homicide; *Woodhaven Police Sgt. James Johnson*, the initial investigator of the murder; *Peter Slywka*, Turetsky's father, who made reward offers for the discovery of the perpetrator; *Dr. Ruth Higgins*, a psychiatrist who was familiar with McCrary's psychiatric problems; *Dr Gregory Kaufman*, who performed the autopsy on Turetzky; and *Frank Raines*, an associate of key witness Lawrence Gorski.

Missing physical evidence was also stipulated to by the parties: tape recordings of conversations between various individuals, including defendants and an individual named Rick Lobdell, which were turned over to the police; an "Anarchist's Cookbook" once possessed by Adams; the contents of Adams' wallet, duffel bag, and automobile, taken from his possession following an alleged extortion attempt and beating in 1984; and, finally, a piece of tissue paper allegedly found by a Turetzky family member in the victim's automobile after her murder and after a search of the car by the police.

Defendant's claims of prejudice which he attaches to these witnesses is wholly speculative. One could as readily speculate that the witnesses would be helpful to the prosecution and harmful to the defense. The speculation as to the testimony of these witnesses is more likely to be helpful to the prosecution:

- *Phillip Hatcher*, the insurance agent who made the policy making Defendant the beneficiary upon Turetzky's death, would have testified as to who initiated the life insurance policy and how Defendant came to be the beneficiary.

- *Jinendra Surti,* the bookkeeper for the medical clinic, could have testified to the financial condition of the clinic, the relationship between defendant and Turetzky, and any irregularities in the records of the clinic which could have been evidence of motive for the murder.

Thomas McCrary, negotiated the payoff check to Adams for committing the murder and could have testified to the irregularity in issuing this check and verify that the check was not for any "known" work done by Adams at the clinic

- *Sgt James Johnson*, the primary investigator of the murder in 1983-1984, could have supplemented the evidence available at time of indictment and trial as he had a large amount of physical evidence which might have been available and could have strengthened the People's case.
- *Peter Slywka,* had offered an award for the identity of the murderer of his daughter, Turetzky and most likely would have accumulated tips and other information which would have strengthened the People's case.

Dr. Gregory Kaufman, possibly could have elaborated on his medical findings when performing the medical examination, but more likely, his testimony would have been the same as the medical examiner who testified as a murder twelve years old might not stand out.

- *Dr Ruth Higgins,* employee at the V.A. Hospital, might have testified that McCrary was incapable of committing the murder as she might have an opinion regarding his psychiatric problems.
- *Michael Baran* could have testified why he and Caurdy came to believe the Defendant arranged Turetzky's murder. They clearly knew that both Adams and Defendant were involved and they wanted to collect the $150,000 reward money.
- *Sandy Kowalski,* friend of Sidhu, who knew Turetzki, and a resident of the motel and near where Turetzki's body was found and who at best would know nothing.
- *Jack Esper*, friend of Gorski, and it would be difficult to know what his speculative testimony would be.

The Michigan Court of Appeals recognized in it opinion that the prosecution was more likely affected by the unavailability of these witnesses as the case had to be made without the benefit of their testimony.

Defendant's argument regarding the missing physical evidence is equally speculative. This missing evidence was certainly not exculpatory. The recorded conversations regarding the murder which were recorded in order to extort Defendant, more than likely contained incriminating statements The Anarchist's Cookbook describing types of strangulation found in Adam's car and the missing tissue paper with Adam's initial would suggest Adam's statement was the truth, that he killed Turetzky at Defendant's request and would enhance the People's case.

The delay here might actually benefit defendant at trial, then, because the deceased witnesses, the missing witnesses and the physical evidence would strengthen the People's case. Moreover, actual prejudice as a result of preindictment delay does not make the claim automatically valid. The prosecution is not under a duty to file charges as soon as probable cause exists and should not be penalized when they defer an

action until completely satisfied that the charge should be filed.[5] A defendant must show not only "actual prejudice, as opposed to mere speculative prejudice...but also that he show that any actual prejudice was substantial–that he was meaningfully impaired of his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected."[6] Even if defendant specifies what the witnesses testimony would have been, actual prejudice is difficult to prove.[7]

Defendant has failed to demonstrate actual and substantial prejudice which would have affected the outcome of the trial. The missing evidence and witnesses in all likelihood would have strengthened the People's case and made the conviction much more likely.

5Lovasco, supra at 759

6Jones v Angelone, 94 F3d 900, 907 (CA 4, 1996). See also *United States v Rogers*, 118 F3d 466, 476 (CA 6, 1991)

7Rogers, supra at 475

Conclusion

Defendant's petition for Certiorari should be denied as defendant has failed to show a deliberate delay to gain tactical advantage by harming the ability of the defense to present its case. He has also failed to show actual and substantial prejudice which would have affected the outcome of the trial, evidence would have made an acquittal likely.

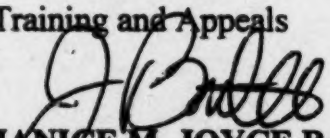
RELIEF

WHEREFORE, the People submit this petition for writ of certiorari should be denied as defendant has failed to present evidence of bad faith conduct by the prosecution designed to prejudice the defendant and/or actual and substantial prejudice.

Respectfully submitted,

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Date: June 12, 2000
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